1949

Flora H. McKenzie v. The Industrial Commission of Utah, Harold J. Whiting, W. Verl Whiting and J. Melvis Haymond, dba Whiting and Haymond, and Western National Indemnity Company : Brief of Plaintiff

Utah Supreme Court

McKay, Burton, Nielsen and Richards; Attorneys for Plaintiff;

7259

In the
SUPREME COURT
of the
STATE OF UTAH

FLORA H. McKENZIE, widow of Owen McKenzie, deceased,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, HAROLD J. WHITING, W. VERL WHITING and J. MELVIN HAYMOND, doing business as WHITING and HAYMOND, Contractors, and WESTERN NATIONAL INDEMNITY COMPANY, a corporation,

Defendants.

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PLAINTIFF'S BRIEF

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INTRODUCTORY STATEMENT

This action has been brought for the purpose of having this Court review an order of the Industrial Commis-

sion of Utah denying the plaintiff death benefits on account of the death of her husband Owen McKenzie. Plaintiff is the surviving widow and was dependent upon Mr. McKenzie for her support prior to his death.

The defendants Harold J. Whiting, W. Verl Whiting and J. Melvin Haymond are co-partners doing business under the name and style of Whiting and Haymond, Contractors, engaged in the business of general contracting and construction work, with their principal place of business located at Springville, Utah, where the deceased resided prior to his death.

Mr. McKenzie died on December 6, 1947, as a result of injuries received in an automobile accident on November 29, 1947. The accident occurred at the intersection of Fifth East and Thirty-ninth South Streets, in Salt Lake County, Utah, while decedent was riding in an automobile owned by Whiting and Haymond (hereinafter referred to as the "Company"), and being operated by J. M. Cranmer, the Company superintendent. The automobile was being operated at Company expense and was being used for the purpose of bringing Mr. Cranmer, Mr. McKenzie and others from Garland, Utah, to their respective homes in Springville, Utah.

On May 25, 1948 the plaintiff filed her application for death benefits under the Workmen's Compensation Law. Thereafter a hearing was held on the 10th day of August, 1948, at Provo, Utah. On August 24, 1948, the Commission rendered its decision, in which it found that

the accident did not arise out of or in the course of the employment of the deceased by the defendant Company.

On September 22, 1948, a petition for rehearing was filed, setting forth several grounds of error, which said petition for rehearing was thereafter denied on October 5, 1948, in consequence of which plaintiff, on the 4th day of November, 1948, filed her petition in this court seeking a review of the Commission's order.

STATEMENT OF FACTS.

There is very little, if any, material conflict in the evidence as to the facts. The evidence discloses that the deceased, Owen McKenzie had worked for the Company since about 1942; that his position during that time was either as foreman or construction superintendent (R. 19). The superintendent of construction is the person who has immediate charge of a particular construction job, while the foreman is the person working immediately under the superintendent (R. 21, 32). At the time of the accident, and for approximately three months prior thereto, Mr. McKenzie had been working on a construction job near Garland, Utah, referred to in the record as the "Garland job". His work had been that of grade foreman under Mr. J. M. Cranmer, who was the superintendent in charge (R. 8, 30). Prior to the Garland job Mr. McKenzie had been employed at Malad, Idaho, where he was superintendent in charge and Mr. Cranmer was employed as foreman under him. (R. 3).

The superintendent in charge of construction was

always furnished a pick-up truck by the Company for his use on the job (R. p. 34). As stated by Mr. Harold J. Whiting, one of the partners, "We furnish a pick-up truck on each job that the superintendent has charge of and is used for bringing parts back and forth from Salt Lake or Springville or any other place." (R. 78) He further testified that the pick-up truck is under the control and supervision of the superintendent, and that Mr. Cranmer was not given any orders as to what particular use he should make of the truck. As a matter of fact, it was left up to the "discretion of the general superintendent as to how he used that pick-up" (R. 85).

At times, when Mr. McKenzie was working on jobs where it was possible, he came home every week-end. While he was the superintendent he came home on Saturday afternoons in the pick-up truck, which was either left at his residence or was taken down to the Company shops in Springville (R. 9, 11, 19, 20, 23). Occasionally it was necessary for him to pick up parts or to have the truck serviced. (R. 15, 28) On both the Garland and Malad jobs Mr. McKenzie had come home every week-end in the pick-up truck (R. 10, 11, 22, 23, 31), with the exception of one occasion, when he came home from the Garland job with a Mr. Harwood (R. 20, 24). On the same occasion Mr. Cranmer and others rode with Mr. Fullmer, because "there were so many men to come down." (R. 35)

Prior to working at Malad, Mr. McKenzie had worked at Boise, Idaho. While working on this job he

did not come home every week-end because it was too far (R. 14), but he was taken to the job by company transportation, and on one occasion was brought home in a Company car (R. 12). Thereafter, when he returned to Boise, the Company furnished his transportation on the train (R. 13, 24).

Mr. McKenzie usually had someone else drive the pick-up truck for him while he was superintendent (R. 20). On the Malad job Mr. Cranmer had frequently driven the car for Mr. McKenzie, and went with the superintendent when he made trips (R. 50). Mr. Cranmer testified that it was the custom and practice for him to ride with Mr. McKenzie when the latter was superintendent, and that this same practice was followed when Mr. Cranmer became superintendent and Mr. McKenzie acted as foreman (R. 51). As a matter of fact, Mr. McKenzie always rode with Mr. Cranmer while on the Garland job with the exception of the one week-end previously indicated (R. 52).

It was also testified that other employees from Springville had their cars at Garland and drove to and from the place of employment, going home on week-ends (R. 26, 42). With respect to such employees the Company did not furnish any gasoline or otherwise pay the expenses of transportation (R. 43, 58). But if there was no way for them to get home, they would ride in the pick-up (R. 49). There were also a number of men employed at Garland from other towns, including Logan and Malad. These men also used their own means of trans-

portation to and from work (R. 65, 71, 76).

The Company maintained living quarters for the men at the place of employment and also operated a cook house where its employees were permitted to eat during the week (although the employees paid for their meals) (R. 33, 45). However, it was not the policy of the company to leave its employees on the job for the week-end (R. 51, 67), except for one person who was left to look after the equipment. On such week-ends no facilities were available for eating, so that the person was required to go to the nearest community (R. 32, 33, 61, 63).

The operations of the Company usually ceased on Saturday afternoon around two o'clock. All of the employees, including the foreman and superintendent, were paid on an hourly rate, and their pay ceased at the time they stopped work (R. 79). On the day of the accident the men ceased work at approximately 2 o'clock P.M. Mr. Harold Whiting was present on the job with the Studebaker automobile, and because he desired to use the pick-up truck, he advised Mr. Cranmer to take the Studebaker in order to go home (R. 34). Mr. Cranmer further stated that it was because he and Mr. McKenzie wanted a ride that Mr. Whiting authorized them to take the car in order to bring the fellows that were there home (R. 37). Mr. Whiting advised another of the employees (Mr. Arthur C. Fryer) that the car was going home, and asked him if he did not want to go along. At that time Mr. Whiting stated that he needed the pick-up, so that Mr. Cranmer was going to take the Studebaker (R. 59).

Mr. Whiting also testified that the superintendent on the job had the use of the pick-up truck; that he knew it was being used for the purpose of bringing employees to Springville and return them to the job, and that such action met with his approval (R. 91, 92). It was also further stated by Mr. Cranmer that the purpose for which he had the truck was "hauling things around, back and forth, and taking men back to work and bringing them home, and any break-down we had, to haul things." (R. 32).

On the afternoon in question the men ceased work about 2 o'clock P.M., at which time Mr. Cranmer was advised by Mr. Whiting to take the Studebaker automobile rather than the pick-up truck. In addition to Mr. Cranmer and Mr. McKenzie, Mr. Arthur Fryer, Mr. Clarence Shoell, Mr. Lee Taylor and another man rode in the automobile. In driving through Salt Lake City, Mr. Cranmer drove to Fifth East and Twenty-first South, where one person left the automobile. Thereafter, Mr. Cranmer turned South on Fifth East and drove to Thirty-ninth South, where the accident occurred at the intersection of Fifth East and Thirty-ninth South. There a traffic semaphore signal was operating, evidencing a red signal for traffic approaching from the north. Mr. Cranmer failed to stop and proceeded into the intersection, where the automobile collided with a Buick automobile being operated eastwardly on Thirty-ninth South Street. The impact occurred over the right front door on the side where Mr. McKenzie was seated, thereby

crushing him between the cars and causing him injuries from which he later died.

ASSIGNMENTS OF ERROR.

Plaintiff's petition herein sets forth as alleged error on the part of the Industrial Commission the following:

1. The Commision erred in finding that the deceased "of his own volition and initiative elected to leave his place of employment and go to his home in Springville, Utah, over the week-end; that he obtained permission to ride to his home in Springville, Utah, in a Company-owned car, driven by Mr. J. M. Cranmer, superintendent of construction for the Company."

2. The Commission erred in finding "that the injury did not arise out of or in the course of" decedent's employment.

3. The Commission erred in failing to find that the defendant company furnished transportation to the decedent as an incident to and part of decedent's employment with the defendant company.

4. The Commission erred in failing to find that the injury and subsequent death arose out of or in the course of decedent's employment with the defendant company.

5. The Commission erred in failing to find that the applicant is entitled to death benefits resulting from the accidental death of Owen McKenzie, deceased.

POINTS RELIED UPON.

For the purpose of this brief the foregoing alleged errors can be grouped into two categories for argument:

1. The evidence is insufficient to support a finding that the decedent obtained permission to ride in the company-owned car on the day of the accident.

2. The evidence is undisputed that transportation to and from Springville, Utah, was furnished by defendant company as an incident of decedent's employment.

ARGUMENT.

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT DECEDENT OBTAINED PERMISSION TO RIDE IN DEFENDANT'S AUTOMOBLE.

Nowhere in the record was it stated either by the individual defendants or by Mr. Cranmer that the decedent at any time requested permission to ride home in the company-owned car. While this point itself is not conclusive as to decedent's status at the time the accident occurred, nevertheless it is evident that the Industrial Commission concluded from the evidence that the accident did not arise out of the course of decedent's employment with the defendant company because of the finding that he had requested permission to ride in the automobile, and therefore the relationship of employer and employee could not exist at the time of the accident. It is plaintiff's contention that if the court should determine

that the Commission erred in finding that decedent obtained permission to ride in defendant's car on the day the accident occurred, the decision of the Commission must be reversed for the reason that such finding supports and gives weight to the ultimate finding that the accident did not arise out of or in the course of decedent's employment with the defendant company.

As hereinbefore related, Mr. McKenzie and Mr. Cranmer had worked closely together on this and other jobs where one had been superintendent and the other the foreman. According to Mr. Cranmer, it was custom and practice for him to ride with Mr. McKenzie when the latter was superintendent, and this same custom was continued on the Garland job, when Mr. Cranmer became superintendent and Mr. McKenzie acted as foreman (R. 51). The truck was furnished to Mr. Cranmer for the purpose of "hauling things around, back and forth, and taking men back to work and bringing them home." (R. 32)

Mr. Harold Whiting, one of the partners, knew that the truck was being used for the purpose of bringing employees to Springville and returning them to the job, and such action met with his approval (R. 91, 92). The company closed up the job on Saturday afternoons and did not care to have any of the employees remain at the camp excepting one left to look after the equipment (R. 51, 61). Mr. McKenzie had ridden home with Mr. Cranmer on every week-end when Mr. Cranmer drove a company vehicle to Springville, and Mr. Cranmer had driven

either the pick-up or the Studebaker home every week-end except one, from the time the Garland job was commenced in September.

In view of this undisputed testimony there appears to be no basis for the finding made by the Commission that Mr. McKenzie voluntarily left the job and obtained permission to ride home with Mr. Cranmer in the company-owned vehicle.

II.

THE EVIDENCE IS UNDISPUTED THAT TRANSPORTATION TO AND FROM SPRINGVILLE, UTAH, WAS FURNISHED BY DEFENDANT COMPANY AS AN INCIDENT OF DECEDENT'S EMPLOYMENT.

At the outset we are confronted with the general rule heretofore announced by this Court that an accident occurring to an employee while traveling to or from work does not arise out of or in the course of his employment. This rule, however, is not without exception. The Supreme Court of the United States in a very early case arising in this State enunciated the policy to be followed in determing the question of liability under Workmen's Compensation laws.

In the case of *Cudahy Packing Co. v. Parramore,* 263 U. S. 418; 44 Sup. Ct. 153; 68 L. Ed. 366; 30 A. L. R. 532, the Court said:

> "The liability is based, not upon any act or omission of the employer, but upon the existence

of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern (Mountain Timber Co. v. Washington, 243 U. S. 239, 61 L. Ed. 697, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N.C.C.A. 927), to escape condemnation as arbitrary, capricious, or clearly unreasonable. Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident happens upon a public road or at a railroad crossing, and that the danger is one to which the general public is likewise exposed is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree."

In *Lamm v. Silver Falls Timber Co.*, 133 Ore. 468; 286 Pac. 527, the Supreme Court of Oregon said:

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours. Honaker & Feeney v. Hartley, 140 Va. 1, 124 S.E. 220. From Larke v. John Hancock Mutual Life Insurance Co., 90 Conn. 303, 97 Atl. 320, 321 L. R. A. 1916E, 584, we quote: 'The period of employment has sometimes been held to cover a period other than that for which wages are paid.' And from our own decision in Wells v. Clark & Wilson Lumber Co., 114 Or. 297, 235 P. 283, 290, the following is taken: 'Yet one may be under such a contract with another as to be a present employee, although the actual work incident to the employment may not be begun until a future day.' And since all workmen's compensation legislation is noticeably inspired by the English act, the following language quoted from John Stewart & Son v. Longhurst (1917) A. C. 249, Ann. Cas. 1917D, 196, is appropriate: 'It has been established by a series of decisions that employment for the purposes of the Workmen's Compensation Act may in many cases be regarded as existing before the actual work has ceased.' In other words, the work may suspend and yet the employment continue. We shall later refer to two cases which applied these principles in a very practical manner. In the one, the deceased employee had maintained his home in North Dakota, but performed

> his services in Minnesota. He lost his life while returning from the latter state to his home to spend the week-end. In the other case, a school teacher was killed at a railroad crossing while on her way to attend a teacher's institute. It was desirable that she should attend the institute, but the law did not make attendance mandatory. In both cases, the courts held that the death arose in an 'accident arising out of and in the course of his employment' and compensation was ordered."

In consequence of the foregoing policy it has frequently happened, as stated by the Oregon Supreme Court in the Lamm case, Supra, that an employee is granted compensation "even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer, engaged in physical service of the latter."

One of the earliest exceptions to the general rule stated above, and which has been generally accepted in the courts throughout the United States, is that where transportation to or from the place of employment is furnished by the employer as an incident of the contract of employment, an accident, occurring while thus travel- to or from the place of employment, arises out of or in the course of such employment.

See, *Hunter v. Summerville,* 205 Ark. 463; 169 S. W. (2d) 579 (where a timber contractor acquiesced in the custom of his employees riding to and from the log woods on one of the trucks of a sub-contractor whose compen-

sation was paid by the contractor); *Jiminez v. Liberty Farms Co.*, 78 Cal. App. (2d) 458; 177 Pac. (2d) 785 (where a farm employee was injured while riding on a truck furnished by the employer); *Wells v. Cutter*, 90 Colo. 111; 6 Pac. (2d) 459; *Johnson v. Weise*, 125 Conn. 238; 5 Atl. (2d) 19; *Myland v. Maryland Casualty Co.* (La.) 28 So. (2d) 351 (where the employer furnished transportation to and from work and charged a small fee therefor, but which fee was not sufficient to cover the entire operation cost. In this case the Court stated that that the fact that the employer could have discontinued the service at any time was immaterial); *Employers Reinsurance Corporation v. Jones* (Tex.) 195 S. W. (2d) 810; *Vaughn v. Standard Surety & Casualty Co.* (Tenn.) 184 S. W. (2d) 566 (where the company permitted its employees to ride home on company trucks but did not pay them for the time involved, and authorized such employees to go home by any means of transportation they desired); *Johnson v. Penwell* (Okla.) 175 Pac. (2d) 266 (where the traction company permitted its employees to ride the company buses to the place of employment); *Pearson v. Aluminum Company of America* (Wash.) 161 Pac. (2d) 169 (where the company furnished a bus to transport its workers to and from the place of employment.)

A good discussion of the policy involved in such cases is found in *Blankinship Co. v. Brown* (Ark.) 208 S. W. (2d) 778, and in *Industrial Commission v. Aetna Life Ins. Co.*, 64 Colo. 480; 174 Pac. 589; 3 A.L.R. 1336.

Bradbury on Workmen's Compensation, 3 Ed., Page 48, states the rule as follows:

> "If an employee is conveyed to and from his work in a conveyance furnished by the employer, under an express or an implied contract to furnish such conveyance, an injury to an employee while on the journey, arises out of the employment."

Again in the case of *Venho v. Ostrander Ry. & Timber Co.*, 185 Wash. 138; 52 Pac. (2d) 1167, the Supreme Court of Washington held:

> "When a workman is so injured, while being transported in a vehicle furnished by his employer as an incident of the employment, he is within 'the course of his employment', as contemplated by the act. In other words, when the vehicle is supplied by the employer for the mutual benefit of himself and the workman to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor. This exception to the rule may arise either as the result of custom or contract, express or implied. It may be implied from the nature and circumstances of the employment and the custom of the employer to furnish transportation." (Citing authorities.)

Nor is it necessary that the employee be subject to the employer's control during the journey.

In the recent case of *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469; 67 Sup. Ct. 801; 91 L. Ed. 1028, the Supreme Court of the United States held:

> "The mere fact that at the moment of the injury, during the journey to or from the work site, the employee is not actually doing the work he is primarily hired to do, or that his acts and movements are not subject to the employer's control, does not render him any less in the service of his employer."

And in the case of *Thomas v. Chickasaw Saw Mill, Inc.* (La.), 23 So. (2d) 701, where the plaintiff was injured while riding home from work on a wagon belonging to the defendant company, the Court determined that a contract for transportation may be implied from the acts of the employer. In that case, as here, the employer knew that the employees were riding on the employer's conveyance, which was used in connection with the business in which he was engaged. The Court there held:

> "However, the rule with regard to transportation has one well-known modification as there are several decisions which hold that a contract with necessary transportation may be implied from the acts of the employer who tacitly permits his employee to ride to and from work on a conveyance used for some purpose in connection with the business in which he is engaged. See Walker v. Mills Engineering Construction Co., 152 So. 83."

In the case of *Konopka v. Jackson County Road Commission,* 270 Mich. 174; 258 N. W. 429; 97 A. L. R. 552, the Court stated the law to be:

> "The law seems rather definitely settled that in cases where the contract of employment ex-

pressly includes conveyance of the employee to or from his place of work, an accident arising out of such transportation and resulting in an injury to the employee is compensable. It is so held because such an accident arises both out of and in the course of the employment. Shneider's Workmen's Compensation Law (2d Ed.), Sec. 265. We think both on reason and on respectable authority the holding should be the same where, as in this case, incident to the employment contract it is contemplated and understood by both the employer and the employee that the former will transport the latter to or from the place where the work is done. *And especially should such be the rule when under a uniform course of conduct the employer does so convey the employee.* We do not think the legal aspect is affected by the fact that the employee may at his option adopt other means of conveyance. The arrangement for conveyance of the employee by the employer, when made, is obviously for their mutual advantage; and from the inception of the journey the employee in a very large sense is under the control of the employer. *Surely the safety or the peril of the journey is within the control of the employer.* The transportation is such an essential incident of the employment as to be a part of it. Hence, if an accident arises out of the transportation so provided, it is an accident arising out of and in the course of the employment. And under the circumstances presented here, it does not seem that a different legal aspect was presented merely because the transportation was in a truck owned and operated by another employee rather than in a truck belonging to and operated by the employer." (Italics supplied)

In the Konopka case the employee was injured while riding in a vehicle owned and operated by another employee and at a time when neither party was being paid for any services by the employer, nor was the employee paid for the use of his truck in connection with the transportation of other employees. The test is, as stated by the Court in that case, "whether, under the contract of employment, construed in the light of all the attendant circumstances, there is either an express or implied undertaking by the employer to provide the transportation."

See also *Laudry v. Louisiana Highway Commission,* 153 So. 74, where a road crew operating road equipment, which was ordinarily returned to the shops at night, left the equipment on the highway and caught a ride home in another conveyance. The Court there held that the road crew, being usually transported home on the equipment, were still in the course of their employment when being transported by another means of conveyance.

> See also, Thompson v. Bradford Motor Freight Line, 148 So. 79; Latham v. Southern Fish & Grocery Co., 181 S. E. 640; McGeorge Corporation v. Industrial Commission, 180 Okla. 346; 69 Pac. (2d) 320; California Casualty Indemnity Exchange v. Industrial Accident Commission, 21 Cal (2d) 461; 132 Pac. (2d) 815; Schneider on Workmen's Compensation (2d Ed.) Sec. 265

Numerous authorities can be found cited in the following A. L. R. Annotations: 10 A. L. R. 169; 21 A. L.

R. 1223; 24 A. L. R. 1233; 62 A. L. R. 1438; 145 A. L. R. 1033.

A case recently decided by the Supreme Court of this State involved a similar situation to the one presented in the instant matter. In the case of *London Guarantee & Accident Co. v. Frazee* (Utah, 1947), 185 Pac. (2d) 284, the Court was concerned with the status of one Frazee during the time he was being transported over his employer's railway line from his home to his place of employment. The transportation was furnished free of charge, but the employee was not paid for the time involved. The Court, in concluding that the relationship of employer and employee existed from the time the employee boarded the employer's conveyance, stated:

> "An arrangement whereby the employer agrees to have the employment commence at the time employee boards the train may be unusual, but it is not so unusual as to be impossible of belief, even though the employee has no duties to perform, can select another means of conveyance, is not paid for his time spent in returning home from the job, is riding a regularly scheduled passenger train, is paid by the month, and is riding on a pass. All of these elements have a bearing on the construction of the contract of employment. They are elements which can be considered in determining when the servant affixed himself to his day's work."

Applying the foregoing rules to the facts in the instant case, which facts are not in dispute and there-

fore involve a question of law for this Court to pass upon, the conclusion is inescapable that the decedent was furnished transportation in connection with his employment and as an incident thereof. During the entire time that he had worked for the defendant company he had had the use of a company vehicle to travel from the job to his home in Springville and return. When he was too far removed from home he did not return every week-end; but on occasions when he did return, the company paid his transportation back to the job. The company at all times furnished a pickup truck for the use of the superintendent, knew that he used it for the purpose of transporting some employees, and acquiesced therein.

Although there is evidence in the record that the employees other than the foreman and superintendent drove their own automobiles to the job, or obtained other means of transportation for themselves, there is no evidence that either the superintendent or the foreman at any time drove their own vehicles, but in all instances except one used company transportation to go to and from the job. The fact that the decedent was a foreman or a superintendent at all times while he worked for the company places him in a different category from the regular employees. As a supervisor he was entitled to and did receive more consideration from his employer. Since the employer left it to the discretion of the superintendent as to how the company vehicle would be used, and since the superintendent himself stated that it was used for the purpose of transporting

himself and others to and from the job (and further stated that on the day in question the use of the Studebaker automobile was given in order that he and Mr. McKenzie might have a means of transportation from the job to Springville, Utah), the evidence conclusively establishes that the transportation furnished to the superintendent and the foreman was incidental to their employment, and that the relationship of employer and employee existed while the decedent was traveling from the job to his home in Springville.

CONCLUSION

In conclusion we submit that the uncontradicted evidence establishes: (1) that the decedent, Owen McKenzie did not seek permission to ride in the company vehicle on the day in question from the Garland job to his home in Springville, Utah, but that on the contrary, such transportation was furnished to him by the company in accordance with the custom and practice, and as a part of and incident to his employment with such company; (2) that while the decedent was riding in the company automobile from the job to his home, the status of employer and employee existed, so that the accident which occurred on the trip homeward arose out of and in the course of such employment.

Respectfully submitted,

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